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NO. 89-7272

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

RONALD ALLEN HARMELIN
Petitioner

v.

THE STATE OF MICHIGAN
Respondent

On Writ Of Certiorari
To the Court of Appeals of Michigan

BRIEF OF PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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43pp

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES.....ii

STATEMENT OF QUESTIONS.....2

STATEMENT OF FACTS.....2

ARGUMENT

I.

MCHIGAN'S MANDATORY PENALTY OF LIFE IN PRISON WITHOUT PAROLE FOR CERTAIN DRUG OFFENSES INVOLVING OVER 650 GRAMS OF A SUBSTANCE CONTAINING THE DRUG IS NOT VIOLATIVE OF THE EIGHTH AMENDMENT.....3

CONCLUSION.....39

INDEX OF AUTHORITIES

CASE — PAGE

Cocio v Bramlett,
872 F 2d 889 (CA 9, 1989)..... 11 , 22

Hutto v Davis,
454 US 370, 70 L Ed 2d 556,
102 S Ct 703 (1982)..... 12

Lockett v Ohio,
438 US 586, 605, 57 L Ed 2d 973,
98 S Ct 2954..... 13, 31

Michigan State Police v Sitz,
47 Cr L 2155 (1990)..... 22

Mistretta v United States,
102 L Ed 2d 714 (1989)..... 12

Rummel v Estelle,
445 US 263, 63 L Ed 2d 382,
100 S Ct 1133 (1980)..... 5

Solem v Helm,
463 US 277, 77 L Ed 2d 637,
103 S Ct 3001 (1983)..... 3

Stanford v Kentucky,
106 L Ed 2d 306 (1990)..... 13

Terrebonne v Butler,
848 F 2d 500 (CA 5, 1988)..... 11, 33

Trop v Dulles,
356 US 86, 101, 2 L Ed 2d 630,
78 S Ct 590 (1958)..... 4

United States v Elkins,
885 F 2d 775 (CA 11, 1989)..... 11

United States v Howard,
894 F 2d 1092 (CA 9, 1990)..... 13
, 31

United States v Martorano,
866 F 2d 62 (CA 3, 1989)..... 11

Weems v United States,
217 US 349, 54 L Ed 793,
30 S Ct 544 (1910)..... 24

Welsh v Wisconsin,
466 US 740, 104 S Ct 2091,
80 L Ed 2d 722..... 21

Young v Miller,
883 F 2d 1276 (CA 6, 1989)..... 11, 30

STATEMENT OF THE QUESTION

IS MICHIGAN'S MANDATORY PENALTY OF LIFE IN PRISON WITHOUT PAROLE FOR CERTAIN DRUG OFFENSES INVOLVING OVER 650 GRAMS OF A SUBSTANCE CONTAINING THE DRUG VIOLATIVE OF THE EIGHTH AMENDMENT?

STATEMENT OF THE CASE

Amicus adopts the statement of the case of the Respondent.

INTEREST OF THE AMICUS

Amicus is the Prosecuting Attorneys of Association of Michigan, to which all elected Prosecuting Attorneys in the state are members. Charged with the responsibility of litigating all criminal violations, including drug offenses, in their respective counties, the outcome of the current litigation is a matter of great interest to all prosecuting attorneys, and thereby the Association.

ARGUMENT

MICHIGAN'S MANDATORY PENALTY OF LIFE IN PRISON WITHOUT PAROLE FOR CERTAIN DRUG OFFENSES INVOLVING OVER 650 GRAMS OF A SUBSTANCE CONTAINING THE DRUG IS NOT VIOLATIVE OF THE EIGHTH AMENDMENT.

A. Introduction

In part C of this argument amicus will attempt to demonstrate that under the analysis seemingly compelled by /#Solem v Helm,@ 463 US 277, 77 L Ed 2d 637, 103 S Ct 3001 (1983)#/ Michigan's mandatory life penalty without parole for certain narcotics offenses involving over 650 grams is not violative of the Eighth Amendment because not "excessive." It will be demonstrated that the penalty is not "disproportionate" to the crime when the nature of that crime is examined, including its blight on "life after life...sparing not even the unborn," see /# Terrebonne v Butler,@ 848 F 2d 500 (CA

5, 1988)#/, and an examination is made with regard to other crimes and their penalties within the State, and with regard to the penalties for similar offenses in other jurisdictions. See Solem v Helm, 463 US at 292 summarizing the appropriate factors in an "excessiveness" analysis. In short, it will be shown that the penalty does not run contrary to the "evolving standards of decency that mark the progress of a maturing society." Trop v Dulles, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958)(plurality opinion). First, however, in logical order, amicus will submit that this analysis is entirely inappropriate for this Court, at least with regard to a term of imprisonment, and that, it being to the contrary, Solem v Helm should be overruled.

B. Solem v Helm Should Be Overruled: A "Mature" Society Expresses Its Views on "Decency" Through Its Legislature

The historical background informing the meaning of the phrase "cruel and unusual punishment" has been explored in depth by various members of the Court, and will not be belabored here. Rather, the beginning of the inquiry will be Rummel v Estelle, 445 US 263, 63 L Ed 2d 382, 100 S Ct 1133 (1980), the first case to consider the question of whether the length of a term of imprisonment alone can be violative of the Eight Amendment as "cruel and unusual." In Rummel the defendant was sentenced to life in prison as an habitual offender upon his conviction of obtaining $120.75 by false pretenses, having been previously convicted of fraudulent use of a credit card to obtain $80 worth of goods or services, a felony, and also passing a forged check in the amount of

$28.36, also a felony. Rummel's life sentence did not preclude parole. The Third Circuit, sitting en banc, affirmed the denial of habeas relief sought on Eighth Amendment grounds, relying largely on the fact that Rummel would be eligible for parole within 12 years of confinement. This Court affirmed.

The Court observed that death penalty cases are different in kind from all other sentences, and that thus death penalty Eighth Amendment jurisprudence is of limited utility in analyzing an Eighth Amendment imprisonment claim. The Court also noted that it was critical that the "Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." 445 US at 275. Although undertaking what might be called a limited proportionality review, the Court

concluded that "Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States. As Mr. Justice Holmes noted in his dissenting opinion in Lochner v New York..., our Constitution 'is made for people of fundamentally differing views....'" 445 US at 281-282. In the end, said the Court, while all would, of course, "like to think that we are 'moving down the road toward human decency'....Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies....This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its

sustaining force in the legislatures, not in the federal courts."

However, three years later in Solem v Helm the Court reached a different result on similar facts. Helm had been convicted of six felonies in an eleven year period, including three convictions of third-degree burglary. The final conviction which triggered his recidivist prosecution was his seventh felony conviction, and was for uttering a "no account" check for $100. The recidivist penalty again was life in prison, but unlike Rummel the sentence was not subject to parole, and it was this factual difference which tipped the scales for the majority of the Court. First, the Court rejected the argument of the State that "excessiveness" or "proportionality" reviews are inappropriate outside the death penalty

situation, though acknowledging that "outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." 463 US at 289-290. The Court concluded that as to any and all sentences, the sentence "must be proportionate to the crime for which the defendant has been convicted," granting to legislatures "substantial deference" to determine the appropriate punishment for a particular crime. However, the Court believed that it (as well as all other courts, including single judge courts) was "competent to judge the gravity of an offense" just as a legislature must "in the first instance." The majority cited as appropriate factors in ascertaining proportionality, and thereby constitutionality, 1)the gravity of the offense and the harshness of the punishment; 2)the sentences imposed on

other criminals in the same jurisdiction; and 3)the sentences imposed for commission of the same crime in other jurisdictions. 463 US at 292. Applying these factors, the majority found that the sentence violated the Eighth Amendment, distinguishing Rummel because of the possibility of parole in that case.

The four dissenting Justices, led by the Chief Justice, read the decision of the majority to mean "that a sentence is unconstitutional if it is more severe than five Justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny to ensure that they are 'proportional' to the crime committed."[1] 463 US at 305. The

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1. The predictions of Chief Justice Burger dissenting in Solem v Helm that a flood of litigation would be unleashed have come true. Federal courts now engage in extensive proportionality analysis of the length

dissenting Justices read the rule of Rummel differently than did the majority; that is, they read the rule to be, in

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(1. con't) of sentences almost routinely, as do state courts. See e.g. United States v Martorano, 866 F 2d 62 (CA 3, 1989)(life sentence without parole for importation of thousands of pounds of drugs); Terrebonne v Butler, 848 F 2d 500 (CA 5, 1988) (extensive proportionality analysis regarding state statute of mandatory life without parole for delivery of 22 packets of heroin); Cocio v Bramlett, 872 F 2d 889 (CA 9, 1989) (extensive proportionality analysis, surveying all 50 states and the District of Columbia, with regard to state statute requiring life sentence without possibility of parole for 25 years for manslaughter under the influence of alcohol by a convicted felon while on parole); United States v Elkins, 885 F 2d 775 (CA 11, 1989) (examining 5 and 10 year sentences for violating export control regulations for selling $57 million worth of high technology aircraft equipment to an unfriendly nation for excessiveness); Young v Miller, 883 F 2d 1276 (CA 6, 1989), examining the Michigan narcotic penalty now at issue before the Court for excessiveness under a proportionality analysis), among a host of others (that few, if any of these challenges are successful does not mean that litigation has not been increased markedly).

cases of imprisonment, that "the length of the sentence imposed is purely a matter of legislative perogative." 463 US at 307. The dissent found the "three factor" proportionality review conducted by the majority squarely rejected by Rummel, and observed that in Hutto v Davis, 454 US 370, 70 L Ed 2d 556, 102 S Ct 703 (1982) the Court had reversed the Fourth Circuit not because of an improper weighing of factors, but because it was improper for a federal court to even engage in a disproportionality analysis, thereby second-guessing the legislative determination as to the appropriate punishment for the crime.

Though not Eighth Amendment imprisonment cases, several other cases from this Court require mention. First is Mistretta v United States, 102 L Ed 2d 714 (1989), the so-called "sentencing guidelines" case, where this

Court said that "the scope of judicial discretion with respect to a sentence is subject to congressional control." It has been recognized, then, that outside the capital sentencing context individualized sentencing is not required, and thus any Eighth Amendment review of a particular sentence of imprisonment (e.g., the mandatory penalty required in the instant case) may take no account of the background of the particular offender (for example, that he is a first offender). See also Lockett v Ohio, 438 US 586, 605, 57 L Ed 2d 973, 98 S Ct 2954 (1978), United States v Howard, 894 F 2d 1092 (CA 9, 1990).

Next is the recent death penalty case of Stanford v Kentucky, 106 L Ed 2d 306 (1990). The question involved in Stanford was "whether the imposition

of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eight Amendment." 106 L Ed 2d at 315. Noting that such an assertion would be historically unsupportable, the plurality opinion upholding the sentences observed that "Neither petitioner asserts that his sentence constitutes one of 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" 106 L Ed 2d at 317. The argument, then, was left to whether capital punishment in the circumstances of the case was contrary to "evolving standards of decency that mark the progress of a maturing society." 106 L Ed 2d at 317-318. But how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools

does a court have to make it? What enables a court to overrule society's expression of its "standard of decency," communicated through statute, imposing a different standard, which is also supposed to be society's standard and not the court's, especially given that "'those institutions which the Constitution is supposed to limit' include the Court itself"? 106 L Ed 2d at 324.

The Court in Stanford canvassed the law of other jurisdictions (in the United States, it being American society which is the concern of the Constitution) and found no consensus against capital punishment for 16 and 17 year old offenders. The plurality (Justice O'Connor not joining this portion of the opinion) also rejected use of socioscientific, ethicoscientific, or

even purely scientific evidence as an "available weapon" in the argument, for the role of the Court, held the plurality, is not to create an evolving standard of decency (that is, not to be an agent of evolution in one direction or the other), but to discover or identify it--not what it should be, but what it is. The plurality disputed the contention of the dissent that it was simply leaving the meaning of the Eighth Amendment to the political majority. Rather, said the plurality, though the Court had cut loose from history in its Eighth Amendment jurisprudence, that action did not leave the Court rudderless, or at least should not have. "Evolving standards of decency" is not a shorthand reference to the preferences of a majority of the court:

> ...to mean that as the dissent means it, ie., that it is for us to judge, not on the basis of what we perceive the Eighth

> Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment'--to say and mean that, is to replaces judges of the law with a committee of philosopher-kings. 106 L Ed 2d at 324.

Finding, then, neither an historical nor a modern societal consensus forbidding imposition of the death penalty on any person who murders at age 16 or 17, the Court concluded that the punishment did not violate the Eighth Amendment.

With this background, amicus returns to the premise of this section--Solem v Helm should be overruled. As indicated in footnote 1, the decision has led to much federal and state litigation, most of it fruitless on the behalf of the defendant, involving the judiciary in proportionality analyses of virtually any

prison sentence upon a claim by the defendant of a violation of the Eighth Amendment. This sort of scrutiny of legislative decisions of the States (or the Congress) is not appropriate--there should not be a "sufficiency of the evidence" test with regard to the decisions of legislatures on the appropriate punishment for criminal acts. Indeed, if the question is whether the punishment meets the "evolving standards of decency," how better are the standards of decency reflected than by the vote of the democratically elected representatives of the society, unless it is not actually the standards of decency of society with which the Eighth Amendment is concerned, but rather the standards of decency of a particular elite (with no assurance, of course, that those standards are in any sense "better"

than those society has expressed through the franchise).

A great problem with judicial review of the length of sentences as to whether they fall within "standards of decency" under a proportionality review is that the test appears to be a one-way ratchet, despite then Justice Rehnquist's observations in Rummel that while all would, of course, "like to think that we are 'moving down the road toward human decency'....Within the confines of (judicial) proceeding(s)...we have no way of knowing in which direction that road lies...." That the ratchet can only turn one way is compelled by an analysis which requires a comparison with other penalties within the State and with penalties from other States. Certainly a finding that a particular State is lenient, in comparison with others, will

not lead to a finding of a constitutional violation, but if that State stands out as most severe then that fact is at least a heavy factor weighing against the constitutionality of the penalty. But common sense, as well as experience, tell us that the sense of society as to the decency of a particular punishment for a class of criminal conduct sometimes turns the other way, becoming more harsh. Solem v Helm prevents a State from becoming a leader in this regard, because then it will fail a proportionality review when compared with other States, and when compared with the view of the judiciary as to the seriousness of the crime, at least where that view differs from that of the society (as expressed through its elected representatives).

Alcohol related motor vehicle offenses are a case in point. For many

years alcohol related automobile offenses were taken very lightly. Experience demonstrated that this attitude was unjustified, given the roadside carnage caused by drunken drivers. This Court itself noted in Welsh v Wisconsin, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 722 (1984) that the State there had an unusually lenient penalty for drunken driving (preventing, in the Court's view, an exigent circumstances entry to arrest for that offense). Justice Blackmun in particular observed that it was "amazing" to him that a State could still classify drunken driving as a civil violation with only a fine for a first offense. As he put it, "The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's

act." See also Michigan State Police v Sitz, 47 Cr L 2155 (1990) (Justice Blackmun concurring, observing that by 1969 the death toll from drunk driving exceeded that from all our wars). But now in most jurisdictions, "society has set its face against" (see Stanford v Kentucky, 106 L Ed 2d at 323) such lenient treatment of drunken drivers. The societal ratchet has turned the other way with regard to appropriate punishment. See e.g. Cocio v Bramlett, 872 F 2d 889 (CA 9, 1989). But Solem makes no allowances for standards of decency requiring harsher treatment of certain offenders, assuming that a "mature" society is one which treats offenders less severely than it had (apparently when immature) in the past.

The societal ratchet has also turned in a manner similar to that of drunken driving with regard to narcotics, and it may be that Michigan is one of the leaders in this regard (a proportionality review will be conducted infra). Amicus submits that the State has a right to be a leader, and that a State legislature may play a role in the shaping of contemporary standards of decency throughout the Nation. Though Michigan's legislature may have set a harsh penalty, the penalty is certainly not one against which "society has set its face"; indeed, society, in the sense of other jurisdictions, is moving in the same direction (Michigan is truly a leader, and not a deviant, in this regard). The differences among jurisdictions turn principally upon the amount of substance which triggers the most severe penalties--the federal jurisdiction, in

fact, is moving toward a possible death penalty for certain drug offenses (see brief of Respondent).

Where the only issue is the length of punishment, and not the mode (see Weems v United States, 217 US 349, 54 L Ed 793, 30 S Ct 544 (1910), and death penalty cases) this Court ought to abandon proportionality review, as our Constitution "'is made for people of fundamentally differing views....'", no federal standard of appropriateness being required (or even permitted). Here Petitioner cannot assert that his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Stanford, supra. And while in the capital sentencing area this Court has cast loose from history, and perhaps

irretrievably so, there is no need for this Court to continue, on scant precedent, to do so with regard to sentences of imprisonment, particularly given that standards cannot be drawn which do not, in the end, turn on the preferences of a majority of the Court. If the test is "evolving standards of decency," then the Court is ill-equipped, particularly as compared to a legislature, to make the assessment of the seriousness of a crime and the harshness of the punishment, particularly armed with a ratchet which turns only one way. Solem v Helm should be abandoned, and the sentence here affirmed, with no proportionality analysis undertaken, and federal review of state sentences of imprisonment on the grounds of "excessiveness" should cease.

Before leaving this section of argument, amicus must candidly recognize that in Rummel then Justice Rehnquist did state, in footnote 11, that "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent...if a legislature made overtime parking a felony punishable by life imprisonment." 445 US at 274 (Amicus doubts this is actually correct; in such a situation an extended proportionality analysis would be unnecessary--like obscenity in the First Amendment area, the "obscenity" of such a penalty would be "known when seen" without further analysis. However, as amicus will suggest below, this Court should not be deterred from overruling Solem v Helm by impossible hypothetical situations). It might be said, then, that even Rummel rejects the result sought by amicus, the end of

proportionality review of sentences of imprisonment. But of course, neither this case, nor any other, presents such an extreme example, nor, amicus submits, will such extreme examples ever be presented by legislative action. This court should not adopt a rule which contemplates that which cannot occur.

In his work Democracy and Distrust (Harvard University Press: 1980), Professor John Hart Ely pondered the constitutionality of a hypothetical statute prohibiting gall bladder operations except to save the person's life. His answer was that the statute could not pass, and that if it did it would be repealed and the representatives who passed it possibly impeached. To the claim that perhaps that wouldn't happen either, the representatives and the public all "just acting crazy," and there

being no possibility of reasoning with them, Professor Hart responded:

> You know what you're telling me? that you don't believe in democracy. With neuroses like yours, I sure as hell would be worrying about problems a lot less rarified than substantive versus participational review. Like whether I'm going to read in tomorrow's paper that my dog is under consideration for Secretary of Agriculture. Ely, at 182.

Professor Ely concluded that "It is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further." In fact, he continued, "it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for the situations where representative government cannot be trusted, not those where we know it can." Ely, at 183 (emphasis added). This language is precisely appropriate for the

"overtime parking" example--this Court should refuse to play, and should not "deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted." This Court should overrule Solem v Helm, and should not be deterred by the overtime parking example, or any other absurd hypothetical.

C. The Michigan Statute Is A "Mature" Societal Expression Of An Evolving Standard of Decency With Regard to the Scourge of Drug Offenses

Amicus also submits that on a proportionality analysis which compares the penalty and crime in the instant case with that of other crimes within Michigan, and with similar offenses in other States, the penalty here passes review. These comparisons are well-covered in the brief of the Respondent, and will not be reiterated at length here. Suffice it to say that in

Young v Miller, 883 F 2d 1276 (CA 6, 1989) the Sixth Circuit rejected the precise Eighth Amendment claim here at issue. That court noted that "we have little doubt that (defendant's) crime is one of the gravest a person can commit today....The ripple effect on society of such a large quantity of heroin is staggering to contemplate." 883 F 2d at 1283. Amicus would point out that though upholding the statute the court made the mistake of considering personal characteristics of the defendant--that she was a first offender, that she was 25 years old at the time of the crime, that she was the mother of a small child, and that she was not the major target of the investigation. But, as has been stated, it has been recognized that outside the capital sentencing context individualized sentencing is not required, and thus any Eighth Amendment review of a particular

sentence of imprisonment (e.g., the mandatory penalty required in the instant case) may take no account of the background of the particular offender. Lockett v Ohio, 438 US 586, 605, 57 L Ed 2d 973, 98 S Ct 2954 (1978), United States v Howard, 894 F 2d 1092 (CA 9, 1990).

Examining other crimes in Michigan, the court found the sentence the same as that for first degree murder and treason, with discretionary life sentences with the possibility of parole existing for second-degree murder, attempted murder, causing death by explosives, armed robbery, first-degree criminal sexual conduct, and kidnapping, among others. The court did not find the fact that Michigan had chosen to recognize the "devastating consequences" of large-scale drug trafficking by "treating that crime

as being more serious than many of the violent crimes" to be inappropriately disproportionate.

With regard to the law of other States, the court found that only Louisiana had as severe a penalty for first offenders (again, a factor amicus submits should not be considered in the Eighth Amendment calculus). See cataloguing of jurisdictions at 883 F 2d at 1285-1285. However, the court found that the Michigan sentence was "in the range" of drug laws of other States, noting that "it may well be that many of these states will change their penal codes to provide even stiffer sentences for drug offenders in the future." The court thus concluded that the penalty did not violate the Eighth Amendment (it should be observed that in different jurisdictions the problem of a particular

class of offense may be different, justifying a different--i.e. more severe --response in one jurisdiction as compared to even a number of others. Each legislature should have freedom to determine the nature of the problem within its borders, and thus the appropriate penalty.)

One other case is worthy of note in this regard, and that is Terrebonne v Butler, 848 F 2d 500 (CA 5, 1988)(en banc), upholding the Louisiana penalty scheme, and oft-cited in Young v Miller. Though finding the criteria offered in Solem v Helm "of little assistance," the court did its best, and engaged in the same sort of analysis the Young v Miller court did later. Quoting from the original panel decision the court observed that:

> Except in rare cases, the murderer's red hand falls on one

> victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image--others who create others still, across our land and down our generations, sparing not even the unborn. 848 F 2d at 504.

The court also recognized the value judgments involved in "comparing crimes," value judgments that courts are ill-suited to make:

> Nor can we say, attempting as best we can to compare the apple of aggravated kidnapping, the orange of heroin dealing and the pear of aggravated arson with each other, that Terrebonne 'has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.' And the reason we cannot do so is that it is far from clear to us that the other crimes that Louisiana punishes similarly are 'far more serious.' 848 F 2d at 504.
>
> ...we are not equipped, nor do our procedures lend themselves to equipping us, with the factual knowledge and common sense of what is proportional, what punishments should be administered for particular offenses, and along what general lines the positive legislative

> attack on criminality should proceed. One who is to do tnis has need, like Antaeus, to touch the earth pretty frequently, an exercise to which our isolation does not conduce. 848 F 2d at 506-507.

Comparing other jurisdictions also, the court concluded that though severe the sentence was not "bizarre or outlandish," and concluded that the sentence did not violate the Eighth Amendment. Amicus submits that the isolation of this Court also does not allow it to "touch the earthy" with regard to the severity of the crime involved here, and that the Court should not undertake to do so, for it cannot without assuming the function of a legislature.

D. Conclusion

In summary, then, amicus submits the following:

1) Solem v Helm should be overruled. Outside the capital punishment area proportionality review of sentences for "excessiveness" should cease. "Evolving standards of decency of an evolving society" are best expressed through the elected representatives of that society rather than the judicial branch of Government, particularly in those circumstances where life-tenured federal judges are otherwise required to second-guess the decisions of State legislators as to the standards of decency that are evolving with regard to particular offenses, and particularly if it is recognized

that standards may evolve both ways (that is, may become more severe for certain offenses).

2) If the Court undertakes a proportionality review, then under a proportionality review for

"excessiveness" the Michigan statute passes as the expression of a "mature society" of a "decent" standard. This review is undertaken not by looking at the individual characteristics of the offender (outside the capital sentencing area individualized sentencing is not required by the Eighth Amendment; if a review of the individual characteristics of the offender were undertaken, it would provide Petitioner no succor), but at the severity of the offense and the severity of the punishment. Given the massive problem of drugs, and the tremendous harm caused by amounts exceeding 650 grams, the punishment here is in no way "bizaare" or "outlandish." It is, in fact, most appropriate.

CONCLUSION

Wherefore, amicus respectfully requests that the judgment of the Michigan Court of Appeals be affirmed.

Respectfully submitted,

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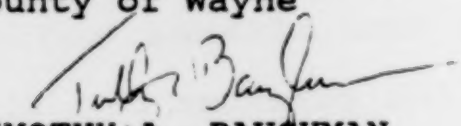

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